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No. 95-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; FRANCIS SLAY, in his capacity of President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and THE CITY OF ST. LOUIS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENTS FRANCIS SLAY, BOARD OF ALDERMEN, AND THE CITY OF ST. LOUIS

TYRONE A. TABOR
City Counselor

EDWARD J. HANLON*
Deputy City Counselor

Office of the City Counselor
the City of St. Louis
Room 314,
City Hall,
1200 Market Street
St. Louis, Missouri 63103
(314) 622-3361

*Counsel of Record

Attorneys for Respondents

St. Louis Law Printing, Inc. 14239 Manchester Rd. Manchester, MO 63011 314-231-4477

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Respondents Francis Slay,[1] Board of Aldermen of the City of St. Louis, and the City of St. Louis respectfully request that this

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(1) and Supreme Court Rule 35.3, Respondent Francis Slay, as Thomas Villa's successor to the public office of President of the Board of Aldermen, is automatically substituted as a party herein.

Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 54 F.3d 1345.

STATEMENT OF THE CASE

Plaintiffs initiated this suit in January 1992, alleging the City of St. Louis' ward boundary lines, which define twenty-eight single-member aldermanic wards,[2] as re-drawn after the 1990 census, violate the First, Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution and § 2 of the Voting Rights Act, 42 U.S.C. § 1973. (1-18.)[3] The district court granted summary judgment in favor of Defendants on all claims. (App. E.) The undisputed evidence before the district court in part showed that the total population of the City of St. Louis is 50.9% white and 47.5% black, and that the voting age population is 55.8% white and 42.7% black. (43.) Further, there had been rough proportional representation of blacks on the Board of Aldermen since 1971, and the 1991 plan provided for proportionality of the voting age population by defining twelve safe black wards out of twenty-eight, or 42.86 % of the wards. (32-35; App. E-8.) Plaintiffs suggested no special circumstances to demonstrate that sustained electoral success does not accurately reflect the minority's ablilty to elect its preferred representatives. (App. E-8.) Further, boundaries of twenty-four of the wards are co-terminous with census blocks, and the average

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[2] In addition to these single-member wards, St. Louis has three city-wide elected officials, including the Mayor, who is black, the Comptroller, who is black, and the President of the Board of Aldermen, who is white.

[3] To maintain consistency with Petitioner's citations, references to the appendix filed in this Court are denoted as ("App. ___."), and references to the appendix filed in the Eighth Circuit are denoted as ("__."). Respondents note, however, that pages 105-127 of the Eighth Circuit appendix, as well as portion H of the Supreme Court appendix, are supplemental materials the district court denied petitioners leave to file, and those materials are not properly a part of the record anywhere in this case.

percent deviation from the ideal ward population is 2.83% and the overall range or maximum deviation is 8.3%. (App. E-4.)

The Eighth Circuit Court of Appeals affirmed the grant of summary judgment, *African American Voting Rights Legal Defense Fund Inc. v. Villa*, 999 F.2d 1301 (8th Cir. 1993) (Table) (per curiam), and denied rehearing. (App. D.) Several plaintiffs withdrew from the case, but the current petitioners remained and sought a writ of certiorari. On the same date that this Court issued its opinion in *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994), this Court granted Petitioners' request for certiorari, vacated the appellate court's judgment, and remanded for further consideration in light of *DeGrandy*. *Tyus v. Bosley*, 114 S.Ct. 2776 (1994).

The Eighth Circuit Court of Appeals again affirmed, in a unanimous panel decision. *African American Voting Rights Legal Defense Fund Inc. v. Villa*, 54 F.3d 1345 (8th Cir. 1995). The Court of Appeals held the district judge did not abuse her discretion in denying plaintiffs leave to file additional belated materials in response to the defendants' summary judgment motion. (App. A-10-12.) The court further held the district court did not commit error in light of *Johnson v. DeGrandy* by using voting age population rather than total population to define the relevant population for assessing proportionality, or by including the entire City of St. Louis rather than only the central corridor area of the City to determine the number of majority-minority wards for measuring proportionality. (*Id.* at A-12-22.) The appellate court further concluded the district court did not treat the proportionality factor as a per se bar to a § 2 voting dilution claim and, in any event, proper consideration of the proportionality factor as it relates to the totality of the circumstances "leads inexorably to the conclusion that the complaints contained in the [plaintiffs'] affidavit fail to create a genuine issue of material fact as to whether a § 2 violation has occurred." (*Id.* at A-22-27.) Finally, the Court of Appeals rejected the

plaintiffs' argument that a § 2 "intent" claim requires no proof of a discriminatory effect. (*Id.* at A-27, n.18.) The Court of Appeals then denied Petitioners' request for a rehearing en banc. (App. B.) Petitioners again request that this Court grant certiorari.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because Petitioners, Who Are Not Residents Of The Wards Where They Claim That There Is Vote Dilution, Do Not Have Standing To Present That Claim.

Upon reconsideration in light of *Johnson v. DeGrandy*, the Eighth Circuit "assume[d] without deciding" that Petitioners had standing to assert their claims. (App. A-3 n.2.) The essence of Petitioners' claims is that blacks in the City of St. Louis have been denied an equal opportunity to elect representatives of their choice through dilution of their vote. (10-12.) At the time of the 1991 redistricting, Petitioner Freeman Bosley, Sr., had proposed a plan to the Board of Aldermen that would result in fourteen safe black wards out of a total of twenty-eight wards; the Board rejected Bosley's plan and instead adopted a plan which provided for twelve safe black wards. (App. A-6.) Petitioners have claimed there were three wards where "defendants maximized white voting power and minimized black voting power. . . 'in order to assure that black voters would not be able to elect representatives of their choice in said wards'": the 6th, 7th, and 17th wards. (88; Petition for Cert. at 5-6.)[4] Petitioners claim that without such vote dilution, blacks would have been able to constitute a voting age majority in wards 6 and 17, giving them

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[4] It is important to note here that this conclusory claim of intentional gerrymandering finds no support in the summary judgment record, and Petitioners acknowledged in their prior certiorari petition that this case never presented a *Shaw v. Reno* type of claim, (First Petition for Cert. at 24), which involves the limited, extreme case where a redistricting scheme is so bizarre that it can only be understood as an effort to segregate voters by race without justification. *See Shaw*, *supra*, 125 L.Ed. 2d at 536; *Miller v. Johnson*, 115 S.Ct. 2475, 2488 (1995).

fourteen safe black wards out of twenty-eight rather than only twelve. (*Id.*)[5]

The only persons who have standing to assert these claims are persons "who live in the district that is the primary focus of their. . . claim" or who can otherwise "demonstrate[] that they, personally, have been subjected to a racial classification." *See United States v. Hays*, 132 L.Ed. 2d 635, 639, 643 (1995). Petitioners are neither. Among Petitioners, Sharon Tyus is a resident and voter in the 20th ward; Freeman Bosley, Sr., in the 3rd ward; Bertha Mitchell in the 4th ward; Irving Clay, Jr. in the 26th ward; and Claude Taylor in the 27th ward. (3-4). According to Petitioners, and it has been undisputed, each one of the wards in which they reside is a safe black ward. (89). Thus, Petitioners lack standing, and it is not likely that the Court will reach any questions presented by their petition herein.[6]

II. The Petition Should Be Denied Because The Eighth Circuit Decision Is Wholly Consistent With *Johnson v. DeGrandy* And Other Precedent.

Throughout their petition, Petitioners color the Eighth Circuit's decision as holding that proportionality "defeats" their Voting Rights Act claims or is a "defense" to such claims. Simply put, the Eighth Circuit made no such holding. To the contrary, the Eighth Circuit reconsidered Petitioners' case at length in light of *DeGrandy*'s holding that "proportionality is not a 'safe harbor' that automatically defeats a claim of vote dilution" but "is only

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[5] Throughout the appellate process, Petitioners have continually reshaped their claims. In their prior certiorari petition, Petitioners argued that blacks lacked an opportunity to elect representatives of their choice in the 2nd, 6th, 7th, 8th, 17th and 25th wards, despite that their Complaint and evidence before the district court asserted the 2nd ward was a safe black ward. (First Petition for Cert. at 18-19.)

[6] This standing analysis remains pertinent even if Petitioners allegations are construed as directed primarily at the 2nd, 6th, 7th, 8th, 17th and 25th wards as set out at note 4 *supra*, as Petitioners reside in none of these wards.

one factor in the totality of circumstances." (App. at A-22.) The court methodically reviewed the Jones affidavit, which while largely conclusory was the only evidence plaintiffs put forth at the summary judgment stage. (*Id.* at A-25-26.) The court further noted that this case is virtually indistinguishable from *DeGrandy*, reviewed the evenhandedness with which the wards were drawn, and noted that the only alleged differential treatment was that black wards contained smaller populations than white wards, which if true actually enhances, not dilutes, black vote. (*Id.*)

Further, the Eighth Circuit's conclusion that a § 2 "intent" claim requires some showing of a discriminatory effect is consistent with this Court's precedent and other court of appeals decisions. This Court in *Voinovich.v.Quiller* stated "[o]nly if an apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect the candidate of its choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter." 113 S.Ct. 1149,1156 (1993). Federal courts of appeals consistently have reached the same conclusion. *See Barnett v. Daley*, 32 F.3d 1196, 1202 (7th Cir. 1994); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). Indeed, § 2 of the Voting Rights Act by prohibiting discriminatory effects liberalizes the proof needed to establish a claim of voter discrimination under the Fourteenth Amendment—if a plaintiff could prove intent he would have a complete remedy under the equal protection clause and would not need § 2. *See Barnett*, 32 F.3d at 1202. Further, the language of § 2 itself speaks to a results claim. *See* 42 U.S.C. § 1973.

III. The Petition Should Be Denied Because The Claimed Split Among Lower Courts As To Whether To Use Voting Age Population Or Total Population In Assessing Proportionality Does Not Justify Granting A Writ Of Certiorari.

The cases Petitioners compare and contrast in order to draw a split over whether to use voting age population or total population when assessing proportionality under § 2 are: the Eighth Circuit case at bar and a post-*DeGrandy* Tennessee district court case which also used voting age population, versus a pre-*DeGrandy* Missouri district court case and a pre-*DeGrandy* Arkansas district court case (both in the Eighth Circuit) which used total population. (Petition for Cert. at 20.) The other case mentioned in this section of Petitioners' argument is *Barnett v. Daley*, 32 F.3d 1196 (7th Cir. 1994), in which the Seventh Circuit in dicta stated with respect to a § 2 claim that while "[t]he statutory language leans in favor of voting-age population," such language is not conclusive on the matter. *Id.* at 1202. The court in *Barnett* did not reach the issue of which population was more relevant. *Id.* These cases do not create a split in authority among the appellate courts justifying certiorari. *See* Supreme Court Rule 10.

Further, this Court in *DeGrandy* used voting age population as the relevant population when assessing proportionality, and *DeGrandy*, if it does not require the use of voting age population, at the very least permits the use of such population. *DeGrandy*, 114 S.Ct. at 2651, 2654, 2658 & n.11, 2662 n.18, 2663; *see* App. at A-16. As the Eighth Circuit in this case correctly recognized, *DeGrandy*'s refusal to hold that voting age population is the *only* relevant possible population does not detract from its holding that voting age population is *a* relevant population. (App. A-16.) Moreover, voting age population is a more relevant population to use when assessing proportionality under a § 2 claim because it more directly relates to the language of § 2 itself, which

prohibits processes resulting in the denial or abridgement of the right to vote on account of race or color, *see* 42 U.S.C. § 1973(a), a right possessed by *voters*.

IV. The Petition Should Be Denied Because The Facts Of This Case Do Not Give Rise To A Results Claim When Different Boundary Drawing Practices Were Used In The Black And White Communities.

As previously noted, Petitioners continue to reshape their claims on appeal. As the Eighth Circuit noted in its decision, the only allegations of differential treatment were that black wards had smaller populations. (App. A-26.) In pages 26-29 of their petition, Petitioners at length discuss "facts" that appear nowhere in this case. For example, it is unsupported that whites are not fractured among the wards, that all blacks in the "central corridor" could be part of black majority wards, that over 90% of the City's white and black residents live in respective contiguous boundaries, and that ward boundaries were manipulated to restore white voting-age majorities in wards that had become majority or plurality black. (Petition for Cert. at 26-29.) Petitioners' third argument amounts to a recharacterization of their claim that black voting power must be *maximized* or that blacks must be given proportional representation or proportionality based on their share of the total population—interpretations of the Voting Rights Act which, if accurate, render the Act unconstitutional and which are foreclosed by *DeGrandy*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Tyrone A. Taborn,
City Counselor

Edward J. Hanlon,
Deputy City Counselor
Counsel of Record

314 City Hall
1200 Market Street
St. Louis, MO 63103
314-622-3361

Attorneys for Respondents